Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARIANNE WILLMAN and
MERVIN C. WILLMAN (Estate of),

Petitioners,

v.

ST. PAUL FIRE & MARINE INSURANCE CO.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Does the exclusive remedy provision of state worker's compensation statutes (employment relationship) also extend to insurance carriers responsible for providing medical care under a state workers compensation statute? Or can suit and other claims be extended in other venues outside of worker's compensation boards for intentional interference with the providing of necessary medical care, goods and services?[1]

1

Estate of Blakely by Blakely v. Abestos Corp., LTD., 766 F.Supp 721 (E.D.Ark 1991) In its most extreme expression the California Supreme Court declared that the workman's compensation law was an exclusive remedy *only* when the duty arose solely from the employment relationship. *Bell v. Industrial Vangas, Inc., 30 Cal.3d 268, 179 Cal.Rptr. 30. 673 P.2d 266 (1981).* At 724

Stump v. Crawford & Co. 726 F.Supp 228 (N.D. Ind 1989).

Neither the fraudulent misrepresentation, nor the emotional distress, nor the additional physical injuries arose"out of and in the course of employment" . . . . It is abundantly clear to this court that plaintiff's claim is not precluded by the exclusive remedy contained in the Worker's Compensation Act At 726 F.Supp 234.

Cavalier MFG v. Wausau, 211 Mich App 330, 535 N.W.2d 583 (1995):"True intentional torts," for which both worker's compensation benefits and tort damages might be awarded . . . . are generally those that do not implicate the hazards of the workplace, but rather involve other interest. At 339.

QUESTION PRESENTED

II.

Because worker's compensation is a creature of government law do worker's compensation benefits (including medical care) raise to the level of a governmental entitlement? Further must the distribution and denial of such benefits meet federal requirements of substantive and procedural due process? And if so may suit be brought in federal court in regard to the distribution and denial of such benefits? Lastly can diversity of citizenship alone be enough to bring such matters into federal court?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The names of all the parties below before the United States Sixth Circuit Court of Appeals are contained within the case caption.

Petitioners Marianne Willman and Mervin C. Willman (Estate of) pursuant to S.Ct. Rule 29.6, state there is no parent or subsidiary company to be listed.

The Respondent before the Sixth Circuit and This Court is St. Paul Fire & Marine Insurance Company. Suit was brought against Respondent in its official capacity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i-ii

PARTIES TO THE PROCEEDINGS AND

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES ..... viii-xv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2-5

SUMMARY OF ARGUMENT 5-7

REASONS FOR GRANTING THE WRIT 7-30

I. THE ACTS COMPLAINED OF DID NOT ARISE OUT OF PETITIONER MERVIN C. WILLMANS' EMPLOYMENT BUT OUT OF A WILFUL DENIAL OF REASONABLE AND NECESSARY MEDICAL CARE AND ARE ACTIONABLE.

..... 7-28

a. The District Court had Proper Subject Matter Jurisdiction and Should have Decided the Matter Under the Heightened Pleading Standard of F.R.C.P. 56 instead of a F.R.C.P. 12(b) (6) Analysis.

..... 7-9

TABLE OF CONTENTS
REASONS FOR GRANTING THE WRIT-Continued

Page

b. Precedent Exists for Bringing Claims of Intentional Infliction of Emotional Distress in Conjunction with Pendant Workers' Compensation Claims. Dismissal Was in Error, F.R.C.P 56 Analysis per *Rmi Titanium v. Westinghouse*, 78 F.3d 1125, 34 Fed. R. Serv. 3d 1288, (6th Cir. 1996) Controls. 9-17

c. Petitioners' 14th Amendment Claims were improperly Dismissed. 18-28

CONCLUSION 28-30

TABLE OF CONTENTS-Continued
APPENDICES

Page

APPENDIX A:
Final Opinion of
The Sixth Circuit Court of Appeals
Filed 3/22/05 ..... A1-A2

APPENDIX B:
Order of the United States
District Court for the Eastern District, Southern Division of
Michigan dismissing Petitioners' case
Filed 2/17/04 ..... B1-B6

APPENDIX C:
District Court Order directing Plaintiffs
to Show Cause and Granting
Defendant Opportunity to Respond
Filed 1/26/04 ..... C1-C3

APPENDIX D:
ARTICLE III. section 2. ..... D1

ARTICLE VI. section 2. ..... D1

14th AMENDMENT XIV [1868] section 1. ..... D1

28 U.S.C. § 1331 ..... D1

APPENDIX E:
Michigan "Worker's Disability Compensation Act of
1969"1969 PA 317 ..... E1-E13

TABLE OF CONTENTS-Continued
APPENDICES

Page

APPENDIX F:
Public Acts of the Legislature of the
State of Michigan
Passed at the Regular Session of 1919
Act 64 Part Ii. Sec.6. ..... F1

APPENDIX G:
Medical Peer Review Respondent Solicited
Which Supports Petitioners' Position Sec.6. ..... G1-G2

APPENDIX H:
Respondent's agent Kimberly Kaine's
letter claiming Petitioners' request for Medical peer review reports in regard to his own physical condition was an unreasonable request H1-10

TABLE OF AUTHORITIES

CASES **Page**

Federal Cases

Adams Fruit Co. v. Barrett,
494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990) 12

Anderson v. Liberty Lobby,
477 U.S. 242,106 S.Ct. 2505, 91 L.Ed2d 202 (1986) ... 17

Atlas Concrete Pipe, Inc. v. Roger J. Au & Sons,
669 F.2d 905, 908 (6th Cir. 1982) 17

Beach v. Owens-Corning Fiberglass Corp,
728 F.2d 407 (7th Cir. 1984). 7

Begay v. Kerr-McGee Corp ,
682 F.2d 1311 (9th Cir. 1982) 7-8

Board of Regents v. Roth,
408 U.S. 564, 92 S.Ct 2701, 33 L.Ed 2d 548, (1972). 18, 29

Conely v. Gibson,
355 U.S. 41, 78 S.Ct. 99, 2 L.Ed2d 80 (1957) 17

Conover v. Montemuro,
477 F.2d 1073 (Rehearing En Banc 3rd. Cir. 1973) 22

Daniels v. Williams,
474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) ... 19

Davis v. Liberty Mutual. Ins. Co.,
840 F.Supp.90 (E.D.Mo. 1993) 10

TABLE OF AUTHORITIES-Continued

CASES **Page**

Federal Cases-Continued

Estate of Blakely by Blakely v. Abestos Corp., LTD.,
766 F.Supp 721 (E.D.Ark 1991) 10-11

Globe Newspaper Company v. Superior Court For the County Of Norfolk,
457 U.S. 596,102 S.Ct 2613, 73 L.Ed.2d 248 (1982) ... 29

Glockzin v. Nortek Inc.,
815 F.Supp 1050 (W.D.Mich 1992) 10

Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011,
25 L.Ed. 2d 287, (1970) 18, 29

Hagens v. Lavine,
415 U.S. 528, 94 S.Ct. 1372 39 L.Ed.2d 577 (1974) ... 20

Hirase-Doi v. U.S. West Communications, Inc.,
61 F.3d 777 (1995) 10

Howard v. Grinage,
82 F.3d 1343, 1349, (6th Cir. 1996) 19, 30

Karcher v. Emerson Elec. Co.,
94 F.3d 502 (Cir.8th 1996) rehearing and suggestion for rehearing denied, certiorari denied 117 S.Ct 1692,
520 U.S. 1210, 137 L.Ed.2d 820 22

TABLE OF AUTHORITIES-Continued

CASES **Page**

Federal Cases-Continued

Kelly v. Caswell & Co.,
883 F.Supp. 189 (E.D.Mich 1995) 10

Lewis v. Kugler,
446 F.2d 1343 (3rd Cir. 1971) 23

Marbury v. Madison ,
5 U.S. (1Cranch) 137, 2 L.Ed. 60 (1803) 20

MCI Telecommunications Corp v. Teleconcepts, Inc,
71 F.3d 1086 (3rd Cir. 1995) 12

Pennsylvania Department of Corrections, et al., v. Yeskey,
524 U.S. 206, 118 S.Ct 1952 (1998) 24

Regents v. Roth, 408 US 564, 92 S.Ct 2701, 33 L.Ed 2d 548,
(1972) 18, 29

Rmi Titanium v. Westinghouse,
78 F.3d 1125, 34 Fed. R. Serv. 3d 1288,
(6th Cir. 1996) 8-9

Roberts v. Roadway Exp., Inc.,
149 F.3d 1098 (10th Cir. 1998) 21-22

Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct 705, 726, 35 L.Ed.
2d 147 (1973) 21

TABLE OF AUTHORITIES-Continued

CASES **Page**

Federal Cases-Continued

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) . . 13

Stump v. Crawford & Co.
726 F.Supp 228 (N.D. Ind 1989) 9-11

Torsky v. Avon Products, Inc.,
707 F.Supp. 942 (W.D.Mich 1988) 10

United States v. Nixon, et al.,
418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) . . 29

Washington v. Glucksberg,
521 U.S. 702, 117 S.Ct 2258,
138 L. Ed. 2d 772 (1997) 19, 30

Wilson v. Beloit Corp.,
869 F.2d 1162 (8th Cir.1989) 11

Wood v.County of Alameda,
875 F.Supp 659 (N.D.Cal 1995) 12-13

TABLE OF AUTHORITIES-Continued

CASES **Page**

State Cases

Beaty v. Thiokol Corporation,
414 So.2d 1292 (Louisana) (1982) 23

Burns v. General Motors Corp.,
151 Mich.App. 520, 391 NW.2d. 396 (1986). 25

Day v. Foote Memorial Hospital Inc,
412 Mich 698, 136 NW.2d. 712 (1982) 26

Forman v. Banquet Barbecue,
284 Mich 44, 278 NW.2d. 758 (1938) 28

Lesner v. Liquid Disposal, Inc.,
466 Mich 95, 643 N.W.2d 553 (2002)..... 28

Kerwin v. Massachusetts Mutual Life Insurance Co.,
409 Mich 401, 295 N.W.2d 50 (1980) 15-17

Kirby v. General Motors Corp.,
145 Mich.App. 798, 377 NW.2d. 915
(1985) appeal denied 25

Kostamo v. Christman Co.,
214 Mich 652, 183 NW.2d 902 (1921) 28

Kostamo v. Marquette Iron Mining Co.,
405 Mich. 105, 274 N.W.2d 411 (1979) 23

TABLE OF AUTHORITIES-Continued

CASES **Page**

State Cases-Continued

McCune v. Grimaldi Buick-Opel, Inc,
45 Mich App 472, 206 N.W.2d 742 (1973) 15

McVey v. General Motors Corp.,
160 Mich.App.640, 408 NW.2d. 408, (1987) 25

Noblesville v. Prince,
438 N.E. (Indiana) 2d 722 (1982) 23

Sanchez v. Eagle Alloy Inc.,
254 Mich 651, 658 NW.2d. 510 (2002) 28

Schneuringer v. Ford Motor Co.,
200 Mich.App. 143, 504 NW.2d 186 (1993)
appeal denied 444 Mich 896, 511 NW.2d. 692 25

Stewart v. Rudner,
349 Mich 459, 84 N.W.2d 816 (1957) 16

Stump v. Commercial Union,
601 N.E.2d 327 (Ind 1992) 10

Dictionary

Black's Law Dictionary Sixth Edition
West Publishing Co. St. Paul, MN 1990 27

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION **Page**

ARTICLE III. section 2. ..... 2, 21

ARTICLE VI. section 2 (The Supremacy clause) . 2, 13, 20

14th AMENDMENT XIV [1868] 2, 4, 7, 12-13, 18-22, 26

Federal Statute

28 U.S.C. § 1331 21

28 U.S.C. § 1332 ..... 5-6, 18

U.S. Supreme Court Rules

S.Ct. Rule 13 (1) 1

Federal Rules of Civil Procedure

F.R.C.P. 12(b) 6, 8

F.R.C.P. 12(b)(1) 8

F.R.C.P. 12(b)(6) 6-7, 17

F.R.C.P. 56 6-9

F.R.C.P. 56(c) 9

TABLE OF AUTHORITIES -continued
CONSTITUTIONAL AND
STATUTORY PROVISIONS -continued

Page

Michigan "Worker's Disability Compensation Act of 1969"1969 PA 317, Eff. Dec. 31, 1969 etc....

418.131(1) 6

418.301(2) 24

418.321 26

418.331 26

418.345 24

418.375 (1) 26

418.375 (2) 4, 26

418.401(1)(b) 24

Public Acts of the Legislature of the State of Michigan Passed at the Regular Session of 1919

Act 64
PART II. SEC.6. 27

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marianne Willman and Mervin C. Willman (Estate of) seek a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Sixth Circuit, which affirmed an opinion and order by the United States District Court for the Eastern District, Southern Division of Michigan which dismissed in its entirety all of Petitioners claims (which included declaratory relief) against Respondent.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals for the Sixth Circuit dated March 22, 2005, is an unpublished Opinion and is reprinted in the appendix hereto ('Apdx.) at (Apdx.A1-A2.)

The Order of the United States District Court for the Eastern District, Southern Division of Michigan dated February 17, 2004 dismissing Petitioners' case is reprinted at Apdx. B1-B6.

The District Court's January 26, 2004 Order directing Plaintiffs to Show Cause and Granting Defendant Opportunity to Respond is reprinted at Apdx.C1-C3.

JURISDICTION

Pursuant to 28 U.S.C. § 1254(1) jurisdiction is vested with this Court. The filing of this Petition is within 90 days from the Sixth Circuit's March 22, 2005 Order (S.Ct. Rule 13 (1)) .

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III. section 2., Article VI, Section 1, Clause 2 (Supremacy Clause), and the 14th Amendments to the United States Constitution, along with pertinent Federal Statutes are reproduced in Apdx. D1.

STATEMENT OF THE CASE

On December 5, 1995 Mervin C. Willman was employed by Mueller Pipliners Inc. as a Journeyman Welder. Mueller Pipliners' Worker's Compensation Carrier on December 5, 1995 was Respondent St. Paul.

On December 5, 1995, Mervin C. Willman was driving his welding rig (truck) between job sites on U.S. 23 outside Ann Arbor, MI, when drivers in two separate vehicles engaged in road rage while trying to pass Mr. Willman, striking his truck and causing it to go into the median and roll over 3-1/2 times.

As a result of the above accident Mervin C. Willman suffered a broken neck and spinal cord injury rendering him a high cervical quadriplegic. (C-4,C-5 injury with paralysis affecting all bodily function including nerves, muscles, bones and organs of the respiratory and cardiovascular systems).

Prior to his 1995 employment-related injury Mervin C. Willman, a former U.S. Marine Sharpshooting Drill Instructor and life-long physical fitness buff, was a pipeline welder in excellent physical condition working-out seven days a week weight-lifting, jogging, and using a stair-stepper.

Despite his new physical limitations Mr. Willman enjoyed life and went to many events with his grandchildren as well as attending movies, going grocery shopping and out to dinner.

Though Respondent covered the initial medical bills and paid Mervin C. Willman for lost wages under the Michigan Workers Compensation Statute soon after Mr. Willman's discharge from University of Michigan Hospital (where he was treated after his accident), Respondent began showing a consistent pattern of interference, delay and denial detrimental to Mr. Willman's welfare, denying or significantly delaying authorization and receipt of reasonable and necessary items including treatments, therapies, medications, and durable medical goods due Mr. Willman, prescribed by his physicians and necessitated by his employment-related injury causing Petitioners duress.

Respondent St. Paul's demonstrated pattern of denials and delays ultimately hastened Mr. Willman's demise. Respondents' denials of payment for physician and hospital services for conditions arising from and directly related to Mervin C. Willman's work-related injury resulted in costs for those services being passed-on to Blue Cross/Blue Shield of Michigan and The Federal Government's Medicare Program, said actions of Respondent were both willful and fraudulent.

Respondent's pattern of delaying services and payments, caused Petitioners to pay thousands of dollars out of pocket for medications and treatments causing financial hardship.

This pattern cited above has continued beyond Mr. Willman's demise in Respondent's denial of death benefits which are rightfully due his widow, Marianne L. Willman, under Michigan Workers Compensation Statute section **418.375 (2)** (infra).

Petitioner Mervin C. Willman died from the ultimate cascade of complications from his work related injury, a death which was undoubtedly hastened by Respondent's repeated denial of medications and appliances.

Claims brought by Petitioners

On 11-25-2003 Petitioners filed an Original Complaint in U.S. District Court. Petitioners brought five (5) claims: 1. Violation of the Due Process Clause of the 14th Amendment U.S. Constitution (denial of death benefits [Substantive right] and failure to provide hearing [Procedural right]). 2. Violation of the Due Process Clause of the 14th Amendment U.S. Constitution, delay and denial (entitled medical goods). 3. Intentional Infliction of Emotional Distress (Respondent's Pattern of delay and denial of treatments, therapies and reimbursement for Petitioners' out of pocket expense). 4. Fraud (claim for declaratory relief because Respondent fraudulently passed cost of care unto Federal Government Medicare program). 5. Breach of Contract.

District Court's disposition of matter

Respondent contened the District Court did not have subject matter jurisdiction and that Petitioner's claims could only be heard by a Michigan Workers' Compensation Magistrate. Petitioner's countered the acts complained of did

not arise out of Petitioner Mervin C. Willmans' employment but out of a wilful denial of medical care and that the District Court could exercise subject matter jurisdiction, based upon diversity as well as federal question jurisdiction. On 1-26-2004 the District Court issued an Order to Show Cause, (Apdx.C1-C3.) to Petitioners "Show Cause why the case should not be dismissed". Petitioners asserted the Court had diversity jurisdiction 28 U.S.C.§ 1332 (Apdx.D2) and that Petitioners' due process rights were violated. On 2-17-2004 the District Court issued Memorandum Opinion and Order Dismissing case (Apdx.B1-B6). The Court concluded no federal question existed and dismissed for Failure to State a Claim, citing claim belonged before a worker's compensation tribunal.

Petitioners subsequently argued the matter before the U.S. Sixth Circuit Court of Appeals. On March 22, 2005, the Court of Appeals affirmed and adopted the opinion of the District Court (Apdx.A1-A2.).

SUMMARY OF ARGUMENT

As the Courts below failed to grasp the acts complained of did not arise out of Petitioner Mervin C. Willman's employment but out of a wilful denial of medical care. This matter concerns the insurance companies bad-faith handling of the claim and has nothing to do with the workplace.

Petitioner Mevin C. Willman died from the ultimate cascade of complications from his work related injury, a death

which was undoubtedly hastened by Respondents repeated denial of medications, services etc.[1]

The District Court dismissed Petitioners' case based on upon F.R.C.P. 12 (b)(6) (Apdx.D3) holding Petitioners failed to state a claim upon which relief could be granted. The District Court held the Michigan Workers Compensation Bureau has exclusive jurisdiction (M.C.L.A. 418.131 ABBA), that the issue of jurisdiction was a substantive issue, thus evading federal review.

Petitioners assert 28 U.S.C.§ 1332 Diversity Jurisdiction (Apdx.D2) alone would have conferred proper subject jurisdiction upon the District Court (discussion infra) in regard to the matter at hand. There exists ample precedent for federal courts to decide state worker's compensation matters whether such claims be pendent or ancillary. State worker's compensation matters are not of such a nature as be outside of the federal courts expertise rather the opposite is true.

The acts complained of did not arise out of Petitioner Mervin C. Willman's employment but out of a wilful denial of medical care. Material issues of fact are in dispute, Petitioners came forward with supporting documents in

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Prior to his 1995 employment-related injury Mervin Willman, a former U.S. Marine Sharpshooting Drill Instructor and life-long physical fitness buff, was a pipeline welder in excellent physical condition working-out seven days a week weight-lifting, jogging, using stair-stepper and Home-Gym cable system.

support of their pleadings, which converted the matter into a F.R.C.P. 56 motion (Apdx.D4).

Petitioners' claims under the 14th Amendment (AMENDMENT XIV [1868] Section. 1.) were properly pleaded and Petitioner Marianne Willman also has a unilateral expectation to death benefits.

REASONS FOR GRANTING THE WRIT

I. THE ACTS COMPLAINED OF DID NOT ARISE OUT OF PETITIONER MERVIN C. WILLMAN'S EMPLOYMENT BUT OUT OF A WILFUL DENIAL OF REASONABLE AND NECESSARY MEDICAL CARE AND ARE ACTIONABLE.

a. The District Court had Proper Subject Matter Jurisdiction and Should have Decided the Matter Under the Heightened Pleading Standard of F.R.C.P. 56 instead of a F.R.C.P. 12(b) (6) Analysis.

The District Court Dismissed Petitioners' case citing *Begay v. Kerr-McGee Corp* , 682 F.2d 1311 (9th Cir. 1982) and *Beach v. Owens-Corning Fiberglass Corp*, 728 F.2d 407 (7th Cir. 1984).

In both cases Plaintiffs brought negligence claims in Federal Court (for on-the-job injuries and/or conditions), in both instances the Courts held that the matter was outside of their subject jurisdiction because the State legislature (of Arizona and Indiana) vested exclusive jurisdiction to hear the

claims with worker's compensation bureau/boards. In *Begay* supra, the Court went further and held:

> The State's denial of a judicial remedy in this case is a denial of the substantive right asserted by the plaintiffs ..... accordingly, the state courts have no jurisdiction over the plaintiffs' claims, and the plaintiffs therefore have no claim to press in this federal action, which depends entirely upon state law. At 409.

In contrast to *Begay* the case at hand depends on federal law as well as state law.

In *Rmi Titanium v. Westinghouse*, 78 F.3d 1125, 34 Fed. R. Serv. 3d 1288, (6th Cir. 1996) the Court examined the standard to be applied when ruling on a 12(b)(1) versus a 12 (b)(6) the Court held:

> If the court considers matters outside the pleadings before it in a 12(b)(6) motion, the above procedure will automatically be converted into a Rule 56 summary judgment procedure. At 1134.

The Court in *Rmi Titanium* further held:

> . . . . when a Rule 12(b)(6) motion is converted to a Rule 56 motion for summary judgment, the court, upon finding genuine issues as to material facts, must deny the motion; whereas on a Rule 12(b)(1) challenge to subject matter jurisdiction, the court is empowered to resolve factual disputes. At 1134-35.

In the instant case Petitioners came forward with information outside of the Pleadings (in regard to Mr. Willman's condition, Mrs. Willman's right of entitlement, and other issues raised) with supporting documents attached to Petitioner's Complaint, meeting the standard set forth in *Rmi Titanium* thus any review on a factual basis is subject to a F.R.C.P. 56 (c) analysis (Apdx.D4). Since material issues remain in dispute this case should be remanded to the District Court for trial on the merits. Petitioners now turn their attention to the issue of Subject Matter Jurisdiction.

b. Precedent Exists for Bringing Claims of Intentional Infliction of Emotional Distress in Conjunction with Pendant Worker's Compensation Claims. Dismissal Was in Error, F.R.C.P 56 Analysis per *Rmi Titanium v. Westinghouse*, 78 F.3d 1125, 34 Fed. R. Serv. 3d 1288, (6th Cir. 1996) Controls.

The acts complained of did not arise during and in the course of Petitioner Mervin C. Willman's employment but were subsequent to it *Stump v. Crawford & Co* 726 F.Supp 228 (N.D. Ind 1989). Michigan case law recognizes this very principle as held in *Cavalier MFG v. Wausau*, 211 Mich App 330, 535 N.W.2d 583 (1995):

> "True intentional torts," for which both worker's compensation benefits and tort damages might be awarded.... **are generally those that do not implicate the hazards of the workplace, but rather involve other interest.** At 339.

In their original Complaint Petitioners brought a claim for Intentional Infliction of Emotional Distress (herein) IIED, the bringing of this claim in conjunction with a claim for death benefits is in no way novel, Intentional Infliction of Emotional Distress meets the criteria just noted. The main thrust of Petitioner's IIED claims was Respondent's pattern of denying reasonable and necessary medical goods (even though Doctors had written prescriptions and Respondent's own Medical Peer review report held items were necessary and related to injury) for Petitioners.

Stump v. Crawford & Co. 726 F.Supp 228 (N.D. Ind 1989) (also see *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind 1992)) is directly on point. In Stump, the employer's worker's compensation carrier as well as a medical services coordinator were held liable for physical injuries and emotional distress, caused by fraud and bad acts in an attempt to limit the worker's compensation benefits (badfaith in choosing medical care, *Davis v. Liberty Mutual. Ins. Co.*, 840 F.Supp.90 (E.D.Mo. 1993)).[2]

2
Federal Courts sitting in Michigan have recognized that there are exceptions to the exclusivity provision of worker's compensation acts. In *Kelly v. Caswell & Co.*, 883 F.Supp. 189 (E.D.Mich 1995) and *Glockzin v. Nortek Inc.*, 815 F.Supp 1050 (W.D.Mich 1992) both Courts noted that Michigan law allows exceptions for intentional torts (also see *Torsky v. Avon Products, Inc.*, 707 F.Supp. 942 (W.D.Mich 1988)(*Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 (1995).

In *Estate of Blakely by Blakely v. Abestos Corp., LTD.*, 766 F.Supp 721 (E.D.Ark 1991) (also see *Wilson v. Beloit Corp.*, 869 F.2d 1162 (8th Cir.1989), Plaintiff sued employer claiming damage to tort claim where employer had lost parts to machine which caused plaintiff injury (suit was actionable). Worker's compensation acts do not stop Courts from taking notice of the legal obligations employers owe their employees. Indeed under the "dual persona doctrine" the *Blakely* court noted:

> In its most extreme expression the California Supreme Court declared that the **workman's compensation law** was an **exclusive remedy *only*** when the duty arose **solely from the employment relationship**. *Bell v. Industrial Vangas, Inc., 30 Cal.3d 268, 179 Cal.Rptr. 30. 673 P.2d 266 (1981).* At 724

The Court in *Stump v. Crawford & Co.*, supra explained (also see *Cavalier MFG v. Wausau*, 211 Mich App 330, 535 N.W.2d 583 (1995)):

> Neither the fraudulent misrepresentation, nor the emotional distress, nor the additional physical injuries arose"out of and in the course of employment" . . . . It is abundantly clear to this court that plaintiff's claim is not precluded by the exclusive remedy contained in the Worker's Compensation Act At 726 F.Supp 234.

Or as the Court *in Estate of Blakely by Blakely v. Abestos Corp., LTD.*, 766 F.Supp 721 (E.D.Ark 1991) rightly stated:

> Put another way, does the Act immunize an employer against all liability in connection with the injury or death of an employee no matter how that injury of death occurred? This Court answers both questions in the negative. At 723

In the case at hand Respondent had legal obligations not to purposefully interfere with Petitioner Mervin C. Willman's receipt of reasonable and necessary medical goods as provided by law. As to Petitioners' interest claim arising under the 14th Amendment, federal law can, will and does preempt state workers compensation law, see *Wood v. County of Alameda*, 875 F.Supp 659 (N.D.Cal 1995) ADA Americans with Disabilities Act of 1990 preempts state law.

The *Wood*, Court looked extensively to *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990), where the plaintiffs sought to sue employer under 29 U.S.C. §1841 Federal Migrant and Seasonal Agricultural Act ("AWPA")). The Court looked to the holding of *Adams Fruit Co.*, to determine whether the federal statute in question allowed workers to pursue federal remedies in light of state worker's compensation statutes (at 494 U.S. 643, 110 S.Ct. At 1387). The *Wood*, Court held the *Adams Fruit Co.*, analysis "requires a court to answer two related questions:

1). Does the federal statute explicitly or implicitly indicate that Congress intended the statute to defer to state law in situations like the one at issue?

2). It does not, do preemption principles mandate that all or part of the state law be denied effect in light of Congress' intent in enacting federal law?

The *Wood* Court held at 664-665:

> Under the Supremacy Clause contained in Article VI of the Constitution, state law is preempted "to the extent it actually conflicts with federal law..., or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984).

In step with the above holding is *MCI Telecommunications Corp v. Teleconcepts, Inc*, 71 F.3d 1086 (3rd Cir. 1995) held.

> . . . . **That a state simply has no power to divest a federal court of its constitutionally or congressionally conferred subject matter jurisdiction has been settled law for nearly a century. At 1109.**

Here in the case at hand we have the 14th Amendment to the U.S. Constitution, not just a federal statute preempting a state statute. The repeated wilful actions of Respondent in denying and delaying necessary medical goods to Petitioner Mervin C. Willman resulted in the earlier then expected loss of Mr. Willman's greatest liberty interest, LIFE infra, in addition to inflicting great emotional distress.

Respondents' Patterns of Interference Resulting in Injury to Petitioner

Mervin Willman was injured several times during physical rehabilitation because of interference from Respondent. Respondent was motivated by a desire to have Mr. Willman do self-transfers at home between bed and wheelchair or commode chair in hopes of eliminating nursing staffing.

Although he was making physical gains Mr. Willman could not master the sliding board to transfer himself from wheelchair to therapy table and back despite numerous attempts. Despite the fact that Mr. Willman was unable to transfer safely and that Mr. Willman's use of the sliding board was also against his physician's better judgement. Respondent insisted Mr. Willman continue trying to use the sliding board or they would cancel payment for his physical therapy sessions.

Respondent's insistence resulted in Mr. Willman being injured during physical therapy on several occasions, including a hip injury that plagued him painfully until his death, a broken leg, and a shoulder injury with torn rotator cuff requiring surgery and causing unremitting pain until his death.

Respondent's Pattern of Delay and Denial of Treatments, Therapies and Reimbursement for Petitioner's out of Pocket Expense

Respondent St. Paul exhibited a consistent pattern of delaying services and payments, caused Petitioners to pay

thousands of dollars out of pocket for medications and treatments causing financial hardship. Besides causing obvious emotional distress this flagrant lateness in payments had medical creditors using collection agencies, hurting Petitioners' credit, a claim Petitioners asserted may be added at a later date (Defamation per se).

As the dissent in *Kerwin v. Massachusetts Mutual Life Insurance Co.*, 409 Mich 401, 295 N.W.2d 50 (1980) noted *McCune v. Grimaldi Buick-Opel, Inc*, 45 Mich App 472, 206 N.W.2d 742 (1973) stated:

> . . . upheld plaintiff's claim of damages for "mental anguish, humiliation, embarrassment, by medical creditors which occurred as a result of defendant's breach of contract" to pay health insurance premiums. . . ."We hold that **this case is the type of contract case in which damages for mental anguish may be recovered. It does not deal with trade and commerce, but with hospital and medical insurance, the provision of which is certainly a matter of "mental concern and solicitude"** on the part of most family heads." Kerwin at 444-445 citing McCune at 478.

In one of Respondent's last denials of reimbursement St. Paul Agent Kimberly Kaines informed counsel that therapy was denied by medical peer reviews of Mr. Willman's case. Respondent's agent Kimberly Kaines claimed Petitioners' request for medical peer review reports in regard to Mr. Willman's physical condition was an

unreasonable request (Apdx.G1-G2.). Being well aware of the delicate balance of Mr. Willman's condition the actions of Respondent's agent Ms. Kaines in denying a high cervical quadriplegic information regarding his own health goes beyond being viewed as so outrageous and so extreme. Mr. Willman's physical state was such that unreasonable delays in medical care could and did result in life threatening consequences and indeed the actions complained of set a new standard of utter indecency.

Eventually Ms. Kaines released copies of medical peer reviews to counsel. In fact, the medical peer reviews did not address the therapy issue at all.

The emotional harm resulting from such conduct is reasonably foreseeable. This claim is consistent with not only Petitioner's intentional infliction of emotional distress claim but also their contract claim and the denial of death benefits claim also. As was noted in *Kerwin v. Massachusetts Mutual Life Insurance Co.*, 409 Mich 401, 295 N.W.2d 50 (1980) citing *Stewart v. Rudner*, 349 Mich 459, 84 N.W.2d 816 (1957) was on point further :

> When we have a **contract concerned** not with trade and commerce but **with life and death, not with profit** but with elements of personality, not with pecuniary aggrandizement but **with matters of mental concern and solicitude,** then **a breach of duty** with respect to such contracts **will inevitably** and necessarily **result in mental anguish, pain and suffering. . . . Far from**

> **being outside the contemplation of the parties they are an integral and inseparable part of it.** . . . At 416.

Respondent's conduct as outlined above was a simple tactic to delay a legitimate entitlement in hopes of securing settlements for lesser sums. As a direct and proximate result of Respondent's custom and pattern of great/gross indifference towards Mr. Willman Petitioner's suffered severe and serious emotional distress.[3]

Accordingly a F.R.C.P 12(b)(6) motion should only be granted if plaintiff can prove no set of facts which would entitle him to relief. *Conely v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed2d 80 (1957). A Motion for summary judgment is appropriate only where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. *Atlas Concrete Pipe, Inc. v. Roger J. Au & Sons*, 669 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, in viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty*

3

In the case at hand the issue in part is the tender of death benefits. As was noted in Kerwin, supra at 442 citing Eckenrode v. Life of America Ins Co, 470 F2d 1, 5 (CA 7, 1972) which "extended this line of reasoning in the context of an insurer's refusal to tender life insurance proceeds" . . . . "[It] is common knowledge that one of the most frequent considerations in procuring life insuranceproceeds is to ensure the continued economic and mental welfare of the beneficiaries upon the death of the insured."

Lobby, 477 U.S. 242, 249, 106 S.Ct 2505, 91 L.Ed2d. 202 (1986) and all factual allegations must be viewed in Petitioners favor.

Material issues are in dispute, this matter was improperly dismissed and should be remanded to the District Court for trial on the merits,

c. Petitioners' 14th Amendment Claims were improperly Dismissed.

Petitioner Mervin C. Willman had a clear entitlement to the medical goods and services, this goodfaith claim is based on well established Federal constitutional principles and supporting Federal case law. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, (1970), the Plaintiff was denied the right to welfare payments. The holding of *Goldberg*, is that a Plaintiff is entitled to the procedural safe guard of a hearing before such benefits can be denied or stopped.

The Court District Court held there was no Federal question (28 U.S.C.§ 1332) involved. Under the 14th Amendment

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The denial of this clear entitlement (entitlement not mere expectation *Board of Regents v. Roth*, 408 US 564, 92

S.Ct 2701, 33 L.Ed 2d 548, (1972)) is a violation of both Substantive and Procedural due process.

The Sixth Circuit standard for examining 14th Amendment violations was set in *Howard v. Grinage*, 82 F.3d 1343, 1349, (6th Cir. 1996), where the Court examined both the procedural and substantive prongs of the 14th Amendment.

> **Substantive due process**, serves the goal of preventing "governmental power from being 'used for purposes of oppression,' " regardless of the fairness of the procedures used. See Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) At 1349.

Addressing procedural requirements of the 14th Amendment the *Howard*, Court held:

> . . . the constitutional inquiry no longer addresses what process was due and whether it was constitutionally sufficient, *but whether the decision to deprive was itself constitutionally defective*. See Loudermill, 470 U.S. at 541-42, 105 S.Ct. at 1492-93. It would be inconsistent with any articulable rationale underlying due process to focus on the failure to provide process when the deprivation has already occurred without it. *Howard* at 1350.

The fact that the focus is upon the decision and not the process is in accordance with the holding of this High Court

in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997).

Petitioners do not dispute that the Michigan Legislature did exclude the State's Circuit Courts from hearing Worker's Compensation claims, but where a pendent state law claim pendent to a federal constitutional claim can be generally adjudicated, particularly where it may be dispositive it should be adjudicated to avoid adjudication of federal constitutional questions *Hagens v. Lavine* 415 U.S. 528, 94 S.Ct. 1372 39 L.Ed.2d 577 (1974). Here in the case at hand the issue concerning the medical services and the Death Benefit is clearly interwoven within the fabric of the 14th Amendment. Under the Supremacy clause (Article VI. section 2):

> This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land;* and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In *Marbury v. Madison* 5 U.S. (1Cranch) 137, 2 L.Ed. 60 (1803), the Constitutional power of the Supreme Court was in question, the Court via Chief Justice Marshall held under the Supremacy clause this Nation's High Court (under its original and concurrent powers of jurisdiction) was in fact the final arbitrator of all disputes arising under the

Constitution (The great power the Supremacy clause confers upon the Supreme Court is also shared by this Nation's lower Courts as well).[4]

The question that must be asked is whether Petitioners' right to access the Federal Courts via the 14th Amendments must take a back seat to the Michigan Worker's Compensation Bureau, Petitioners assert (based on the argument above and which follows) in no uncertain terms that if the Supremacy Clause is to be accorded its due then clearly the answer is NO.

The pure fact that the word "Constitution" appears before the words " *Laws of the United States* which shall be made in Pursuance thereof;" *clearly indicates that the Constitution itself takes precedence over an enactment of Congress*[5] *and without question any enactment of any State.* The Rights asserted by Petitioners are embedded in the Constitution and "implicit" with this Nation's sense of "ordered liberty". *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct 705, 726, 35 L.Ed. 2d 147 (1973).

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4 Article III. section 2. :
The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

5 As does 28 U.S.C. § 1331, which holds:
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

The power of the Supremacy clause in a workers compensation context was noted in *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098 (10th Cir. 1998) where the Court held that the Supremacy clause estopped the Colorado Worker's Compensation act from being the exclusive remedy for civil rights violations resulting in emotional distress (also see *Karcher v. Emerson Elec. Co.*, 94 F.3d 502 (Cir.8th 1996) rehearing and suggestion for rehearing denied, certiorari denied 117 S.Ct 1692, 520 U.S. 1210, 137 L.Ed.2d 820, state worker's compensation statute cannot preempt right to recover emotional distress damages falling under federal right.

Abstention

A more proper reason for dismissal would have been for abstention, but even abstention is not applicable to the case at hand, as was held in *Conover v. Montemuro*, 477 F.2d 1073 (Rehearing En Banc 3rd. Cir. 1973):

> Weighed against the undesirability of a premature decision of the federal issue is the mandate from *1080 Congress in the Civil Rights Acts passed pursuant to the fourteenth amendment that federal courts will afford a prompt remedy for violations of that amendment and that such *remedy includes federal fact finding.* [FN4] See Mitchum v. Foster, supra. *Thus, if abstention in face of a state court adjudication would be likely to cause delay or if the evidentiary and ultimate facts on which the fourteenth amendment claims depend are in dispute the federal court*

> *should exercise its discretion against Pullman type abstention.* At 1079-80.

In further supports of the above is *Lewis v. Kugler*, 446 F.2d 1343 (3rd Cir. 1971):

> Federal courts faced with federal constitutional claims *should abstain only when there is an unresolved question of state law which only the state courts can authoritatively construe.* At 1346.

Claim Standard in an Award\Denial of Death Benefit Michigan Workers Compensation Hearing Is Not Beyond the Expertise of the Federal Courts

Here in the case at hand there is no unresolved question of State law which the Federal Courts cannot authoritatively construe, indeed the standards and formality of a Workers Compensation Hearing are not as detailed as the Federal Courts. Worker's Compensation Magistrates are allowed to rely on their own judgment as to given facts and great deference is given to lay opinion even in regard to matters surrounding complicated health issues. In fact a Michigan Case has set the standard in this area *Kostamo v. Marquette Iron Mining Co.*, 405 Mich. 105, 274 N.W.2d 411 (1979), Indiana adopted the holding of *Kostamo in Noblesville v. Prince*, 438 N.E. 2d 722 (1982) as did the State of *Louisiana in Beaty v. Thiokol Corporation*, 414 So.2d 1292 (1982) (*Noblesville v. Prince* and *Beaty v. Thiokol Corporation* also offer excellent detailed analysis).

Respondent's Denial of Death Benefit. Last Hospital Stay Was Related to Work Related Injury

Respondent claimed that Petitioner Mervin C. Willman's last hospitalization (in which he passed away) was not work related (Petitioner died of lack of oxygen causing brain injury brought on by pneumonia, due to heart and lung complications directly related to complications resulting from quadriplegia.).

It is without question Mr. Willman did not have any pre-existing cardiovascular problems before he suffered his employment related injury. Yet Respondent denied Petitioner Marianne Willman her rightful death benefit (plus funeral costs M.C.L.A. 418.345 ABBA). Petitioner Mervin C. Willman's cardiovascular disease was a direct result of his 1995 employment-related spinal cord injury which contributed to or aggravated or accelerated his coronary disease in a significant manner. The Michigan Workers Compensation Act Sec **418.301 (2)(ABBA** (Worker's Comp. Act 317 of 1969, Apdx.E3-4.) holds (also see M.C.L.A. 418.401 Apdx.E12-E13):

> Mental disabilities and conditions of the aging process, **including but not limited to heart and cardiovascular conditions** shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner.

The above language makes clear the specific mandate (*Pennsylvania Department of Corrections, et al., v. Yeskey,*

524 U.S. 206, 118 S.Ct 1952 (1998))of the legislator by specifically using coronary conditions as the prime example of a pre-existing work related compensable injury. The Courts are in agreement with the legislative intent in regard to coronary conditions. *Schneuringer v. Ford Motor Co.*, 200 Mich.App. 143, 504 NW.2d 186 (1993) appeal denied 444 Mich 896, 511 NW.2d. 692, significant manner applied to all heart cases not only cases where employee had no prior heart damage. *Burns v. General Motors Corp*, 151 Mich. App. 520, 391 NW.2d. 396 (1986). The damage to Mr. Willman's spinal cord affected his whole body including his heart. The injury Mr. Willman suffered December, 1995, was the proximate cause of his death and was a "specific event" linked to Petitioner Mervin C. Willman's work related injury. *Kirby v. General Motors Corp.*, 145 Mich.App. 798, 377 NW.2d. 915 (1985) appeal denied, also see *McVey v. General Motors Corp.*, 160 Mich.App.640, 408 NW.2d. 408, 411 (1987) appeal denied.

Petitioner Mervin C. Willman's spinal cord injury caused hypoventilation, and the decreased activity lead to increased weight gain which further aggravated hypoventilation (inability to breath normally causing lack of oxygen) secondary to cervical quadriplegia.

Even the medical peer review Respondent solicited (Apdx. H9), supports Petitioners position:

> . . . medications listed appear to be medically appropriate for treatment of **cardiovascular disease, urinary, pulmonary and**

gastrointestinal complications resulting from quadriplegia.

Denial of Conclusive Right to Death Benefits Due under Michigan Worker's Compensation Act

By participating in the State of Michigan State Worker's Compensation program Respondent has purposefully engaged themselves in the issuing of governmental benefits a.k.a. entitlement program.

Upon the death of Petitioner Mervin C. Willman his weekly worker's compensation wage benefit was to be converted into a death benefit for his widow Petitioner Marianne Willman (*418.375 (1) & (2) Death of injured employee; death benefits in lieu of further disability indemnity*, (Apdx.E 10-11) . This death benefit is to run for a period of 500 weeks following the death of an employee *418.321 Compensation for death resulting from personal injury.* (Apdx.E5). Under the Michigan Worker's Compensation Act of 1969, a wife was conclusively presumed to be wholly dependant on her husband. *418.331 Persons conclusively presumed to be wholly dependant for support upon a deceased employee* (Apdx.E6-E8).

The conclusive presumption language was held violative of Equal protection under the 14th Amendment to the U.S. Constitution in *Day v. Foote Memorial Hospital Inc*, 412 Mich 698, 136 NW.2d. 712 (1982), instead of extending the language to cover all spouses the court held all spouses

must prove dependency even though the legislative history clearly suggest that all spouses should be covered, infra.

The most important thing about *Day*, is that it is a clear acknowledgment by the high court of Michigan that the State's Worker's Compensation Act must comport with the Federal Constitution and its Amendments.

The legislative history clearly indicates all spouses were conclusively intended to receive death benefits at least as far back as State of Michigan Public Act 64, Part II. SEC.6, (1919) (a)(b)(Apdx. F1) . According to Black's Law Dictionary (Sixth Edition) defines conclusive as:

> **Conclusive.** Shutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; **irrefutable**; decisive. Beyond dispute; manifest; plain; clear; **obvious**; visible; apparent; indubitable; palpable.
>
> **Conclusive Evidence.** That which is incontrovertible either because the law does not permit it to be contradicted, or because it is so strong and convincing as to overbear all proof to the contrary and establish the proposition in question beyond any reasonable doubt.
>
> **Conclusive presumption.** Exists when an ultimate fact is presumed to be true upon proof of another fact, **and no evidence, no matter how persuasive, can rebut it;.**

The striking down of the conclusive language and failing to extend it to all spouses clearly goes against the State of Michigan's rich legislative worker's compensation history. Indeed the prior case law in the area should control as was held in *Forman v. Banquet Barbecue*, 284 Mich 44, 278 NW.2d. 758 (1938), dependency is not even an issue placed in question irrespective of the facts when the dependants in question are a husband, wife or child (Below the age of 16 or some incapacity). (Also see *Kostamo v. Christman Co.* 214 Mich 652, 183 NW.2d 902 (1921), test of dependency).

The striking down of the conclusive language even conflicts with the Michigan Supreme Courts own holding in *Sanchez v. Eagle Alloy Inc.*, 254 Mich 651, 658 NW.2d. 510 (2002):

> This Court must apply the language of the statute as enacted, without addition, subtraction, or modification. *Lesner v. Liquid Disposal, Inc., 466 Mich 95, 101, 643 N.W.2d* 553 (2002). This Court may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived for the words of the statute itself. Id. In other words, the role of the judiciary is not to engage in legislating. At 515.

Applying the preceding to the case at hand it is clear the Michigan Supreme Court improperly engaged in legislating and as a result the prior legislative history in regard to conclusive presumption should control.

REQUEST FOR DECLARATORY RELIEF

In addition to remanding this matter to the District Court for the reasoning cited above Petitioner Marianne Willman is entitled to 500 weeks (applied retroactively) of the current statutory maximum dollar amount plus funeral and burial expenses Petitioners request the following;

Under the Michigan Worker's Compensation Act if an individual needs a reasonable and necessary medical appliance such as a wheelchair or modifications to their home and said appliance is denied by the Workers Compensation carrier an employee must file for a Notice of Dispute.

There is no provision in the Act to cover attorney fees thus individuals in need are forced to accept a lesser item not as suitable to their specific needs or are forced to go without a reasonable and necessary medical appliance altogether.

An injured employee should not have to bear the cost of retaining counsel to obtain reasonable and necessary appliances or to have medical bills covered to which there is a legitimate right of entitlement. *Regents v. Roth,* 408 US 564, 92 S.Ct 2701, 33 L.Ed 2d 548, (1972), *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, (1970).

The type of situation described above repeatedly happened to Mr. Willman and is capable of repetition yet evading judicial review *United States v. Nixon, et al.*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), *Globe*

Newspaper Company v. Superior Court For the County Of Norfolk, 457 U.S. 596,102 S.Ct 2613, 73 L.Ed.2d 248 (1982).

Wherefore Petitioners ask this Court to rule that an injured employee should not have to bear the cost of obtaining counsel to obtain reasonable and necessary appliances or to have medical bills covered to which there is a legitimate right of entitlement. Such a finding would be consistent with both substantive and procedural due process *Howard v. Grinage*, 82 F.3d 1343, 1349, (6th Cir. 1996) *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997). That said cost (reasonable hourly attorney fee) shall be borne by Worker's Compensation Carriers.

Petitioners further request this Court restore the original intent of the Michigan Legislature that all spouses are conclusively presumed to be dependent on their spouse and thus entitled to worker's compensation death benefits.

Lastly Petitioners request that this matter be remanded to District Court for trial on the merits.

Respectfully submitted by:

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NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 04-1365

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARIANNE WILLMAN,	**)Filed**
	)Mar 22 2005
Plaintiff-Appellant	**)Leonard Green Clerk**
	)
Mervin C. Willman, (Estate of)	**)ON APPEAL FROM**
	)THE UNITED
Plaintiff-Appellant,	**)STATES DISTRICT**
v.	**)COURT FOR THE**
	) EASTERN
ST. PAUL FIRE & MARINE	**) DISTRICT OF**
INSURANCE CO.	**) MICHIGAN**

Defendant-Appellee

Before: MERRITT and ROGERS, Circuit Judges; and HOOD, District Judge.*

ROGERS, Circuit Judge. The plaintiff, Marianne Willman, representing the estate of her deceased husband, appeals the district court's dismissal of her complaint for failure to state a claim upon which relief can be granted. For the reasons set forth in the district court opinion, we affirm the dismissal of

the Plaintiff's complaint.[1]

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*The Honorable Joseph D. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

1
In addition to failing to state a state-law claim upon which relief can be granted under federal diversity jurisdiction, the plaintiffs also have failed to state a claim that would warrant the exercise of federal question jurisdiction. Although the plaintiff did assert two claims based on alleged due process violations of the Fourteenth Amendment, it is clear that these claims have no merit because St. Paul is a private insurance company to which the Fourteenth Amendment does not apply. *United States V. Morrison, 529 U.S. 598. , 621 (2000)(quoting Shelley v. Kraemer,* 334 U.S. 1, 13 (1948)) ("[T]he Fourteenth Amendment, by its very terms, prohibits only state action.... 'That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.")

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Marianne Willman, &

Mervin C. Willman, (Estate of)
Plaintiffs

v.

ST. PAUL FIRE & MARINE INSURANCE CO.

Defendants

CLOSED FEB 17 2004

Case No. 03-74751
Honorable
Arthur J. Tarnow
United States
District Judge

MEMORANDUM OPINION AND ORDER DISMISSING CASE FOR FAILURE TO STATE A CLAIM

On November 25, 2003, Plaintiff, representing the estate of her deceased husband, filed a compliant and motion for a preliminary injunction, seeking an award of death benefits under the Michigan Worker's Disability Compensation Act, M.L.C. § § 418. 101- 418.941. Plaintiff asserted both federal question a d diversity jurisdiction. 28 U.S. C. § § 1331 and 1332(a) respectively. On December 23, 2003, Defendant filed a motion to dismiss, arguing that there is no federal question and this Court, therefore, lacks

subject matter jurisdiction. Defendant did not address the issue of diversity jurisdiction. On January 26, 2004 the Court issued an oorder directing Plaintiff to show cause why the case should not be dismissed. The order directed Plaintiff to address three issues (1) why this court should assert diversity jurisdiction in a matter arising under state law and involving no federal questrion; (2) the requirements for a preliminary injuction; (3) why this Court should not abstain from hearing the matter. Both parties timely filed a response to the show cause order. Having reviewed the responses, the Court has determined that oral argument is not necessary.

As the Court stated in it's January 26th, show cause order, there is clearly no federal question which would invoke the Court's jurisdiction. Because there is no federal question, and this type of action is generally pursued first in the worker's compensation court, the Court was concerned that exercising its diversity jurisdiction would not further the interest of judicial economy or comity. Thus the Court was of the opinion that abstention was proper. However, having further considered the matter, the Court concludes that Plaintiff's complaint must be dissmissed for failure to state a claim upon which relief can be granted.

Michigan substantive law applies to Plaintiff's claim. *Erie R. R. V. Tompkins,* 304 U.S. 64 (1938) (federal courts sitting in diversity must apply state substantive law). The Michigan Worker's Disability Compensation Act (Act) provides:

> Any dispute or controversy concerning compensation or other benefits sahll be submitted to the [worker's compensation]bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable.

M.C.L. § 418.841 (1). An initial reading of this provision appears to divest any court of jurisdiction (including diversity jurisdiction) to hear claims arising under the act. It also raises the question of whether a plaintiff filing a suit under the Act could state a claim an any other forum. Although not controlling, the Court finds *Begay v. Kerr-McGee Corporation,* 682 F.2d 1311 (9th Cir. 1982) and *Beach v. Owens-Corning Fiberglass Corporation,* 728 F.2d 407 (7th Cir. 1984), particularly instructive.

In *Begay*, a group of disabled Navajo miners and their wives and widows (collectively, plaintiffs) filed suit against the miner's employer in federal court, claiming that exposure to radon radiation caused the miners' severe illnesses and death. The plaintiff., invoking both federal question and diversity jurisdiction, sought damages on theories on negligence, strict liability, and intentional tort. The sole remedy provided by Arizona law, however, was no administrative claim for worker's compensation. Exclusive jurisdiction of worker's compensation claims was vested in the Industrial Commission of Arizona. The district court dismissed the case, concluding that, because Arizona law

would deprive an Arizona court of jurisdiction if a similar case had been filed in state court, the district court lacked diversity jurisdiction. *Begay*, 682 F.2d at 1315.

The Ninth Circuit framed the issue as whether the plaintiffs' complaint stated a claim for relief under Arizona law pursuant to the *Erie* doctrine, not whether the district court lacked subject matter jurisdiction. *Id.* The Court stated: "Although the states have the power to prevent the federal court from granting relief in a diversity case by denying the substantive right of action asserted, they 'have no power to enlarge or contract the federal jurisdiction'" *id.* "Noting in *Erie*, its progeny, or the principles of federalism supporting the doctrine suggests that a state statute may operate to divest a federal court of the jurisdiction conferred by 28 U.S.C. § 1332 (a)." *Id* at 1316. *See also Dominion Nat'l Bank v. Olsen*, 771 F.2d 108, 116 n.2 (6th Cir.1985).

Nonetheless, the Ninth Circuit affirmed the district court's dismissal of the complaint on the ground that the plaintiffs could not state a claim upon which relief could be granted. The court reasoned that the Arizona statute vesting exclusive jurisdiction or worker's compensation claims in the Industrial Commission was a substantive provision, which, under *Erie*, thee federal district court was bound to follow. *Id* at 1317-18. "[P]ermitting a federal court to award damages in this case when the state court could not would directly conflict with the twin aims of *Erie*, by encouraging forum shopping and permitting inequitable administration of the laws."*Id.* At 1318. In an Arizona court hearing the case

could not award damages to the plaintiffs, neither could a federal district court. *Id/* at 1319.

The facts in *Beach*, were similar to those in *Begay*. The plaintiffs, residents of Indiana, filed suit in federal court for worker's compensation benefits, although an Indiana statute vested exclusive jurisdiction of such suites with the Industrial Disputes Board. The district court granted summary judgment to the defendant employer, concluding that it lacked subject matter jurisdiction due to the wording of the statute. *Beach*, 728 F.2d at 408.

The Ninth Circuit, citing *Begay*, disagreed with the district court's analysis but affirmed the grant of summary judgment on the basis that the plaintiffs failed to state a claim upon which relief could be granted. The Court stated:

> The Indiana law vesting exclusive jurisdiction over disputes between employees and their employers in the disputes board operates to close state doors to the plaintiffs. The state's denial of a judicial remedy in this case is a denial of the substantive right asserted by the plaintiffs.... Accordingly, the state courts have no jurisdiction over the plaintiffs' claims, and the plaintiffs therefore have no claim to press in this federal action, which depends entirely on state law. *Id* at 409.

Applying these principles to the case *sub judice*, the Court holds that although M.C.L. § 418.841 (1) cannot divest this court of diversity jurisdiction, it denies Plaintiff a judicial remedy and thereby divest her of a substantive right. Thus

under *Erie*, Plaintiff cannot state a claim in federal court. Accordingly, the case must be **DISMISSED.**[2]

IT IS SO ORDERED.

s/s Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated Feb 17 2004

1
This Court is not concluding that Plaintiff is not entitled to a hearing. Nor is the Court rendering an opinion as to the merits of Plaintiff's claim. The Court is only holding that Plaintiff cannot state a claim in federal court. Her complaint belongs in the worker's compensation tribunal, as provided by statute.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Marianne Willman, &

Mervin C. Willman, (Estate of)
Plaintiffs

v.

ST. PAUL FIRE & MARINE INSURANCE CO.

Defendants

FILED
JAN 26 2004

Case No. 03-74751
Honorable
Arthur J. Tarnow
United States
District Judge

ORDER DIRECTIN PLAINTIFFS TO SHOW CAUSE AND GRANTING DEFENDANT OPPORTUNITY TO RESPOND

On November 25, 2003, Plaintiffs filed a complaint and motion for a preliminary injunction, seeking an award of death benefits under the Michigan Worker's Disability Compensation Act. Plaintiffs asserted both federal question and diversity jurisdiction. On December 23, 2003, Defendant filed a motion to dismiss, arguing there is no federal question and this Court, therefore lacks subject matter jurisdiction.

The first question presented by every case filed in federal court is whether the court has jurisdiction to hear the

case. "The primacy of jurisdiction is evident, for without it courts have no power." *Douglas v. Baldwin & Assoc., Inc.*, 150 F.3d 604, 606 (6th Cir. 1998) Federal courts are courts of limited jurisdiction and may exercise only those powers authorized by the United States Constitution and federal statute, *Id.* " It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rest upon the party asserting jurisdiction.' *Kokkonen Life Ins. Co of America*, 511 U.S. 375, 377 (1994).

Plaintiffs have crafted a fantastic argument as to why this Court should exercise jurisdiction for due process reasons. However, this Court *clearly* lacks federal question jurisdiction. Although Plaintiffs also invoke diversity jurisdiction, the Court is reluctant to assert jurisdiction of matters such as these, which ordinarily lie within the province of state courts. This Court is particularly concerned that Plaintiffs have not even attempted tp pursue their claim with the Worker's Compensation Bureau. The Court is of the opinion that, even if diversity jurisdiction exists, this is a proper case for abstention.

This Court also questions the propriety of a preliminary injunction in this typ of case. Even if the Court was convinced that an injunction would be proper, Plaintiffs have not shown the Court that the four requirements for a preliminary injunction have been satisfied. *See Mason County Med. Ass'n v. Knehel*, 563 F.2d 256 (6th Cir. 1977).

IT IS ORDERED, therefore, that Plaintiffs show cause in writing within **ten 10** days why this case should not

be dismissed. Plaintiffs' response must *specifically* address each of the following:

* Why this Court should assert diversity jurisdiction in a matter arising under state law and involving no federal question;

* The requirements for a preliminary injunction;

* Why this is *not* an appropriate case for federal court abstention.

Defendant is hereby granted an opportunity to respond to the issues in this order within the same ten-day period.

SO ORDERED.

s/s Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated JAN 26 2004

CONSTITUTIONAL AND STATUTORY PROVISION FEDERAL RULES

Article III. section 2. :

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Supremacy clause (Article VI. section 2):

This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land;* and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

14th Amendment XIV [1868]. Due Process Clause

. . . . nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings
(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . .
(6) failure to state a claim upon which relief can be granted, ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56. Summary Judgment
(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

CONSTITUTIONAL AND STATUTORY PROVISIONS
STATE OF MICHIGAN STATUTES

WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)
Act 317 of 1969

418.131 Exclusive remedy; exception; "employee" and "employer" defined.

131.

(1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

(2) As used in this section and section 827, "employee" includes the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or

incident to a self-insured employer's liability servicing contract.

History: 1969, Act 317, Eff. Dec. 31, 1969 ;-- Am. 1972, Act 285, Imd. Eff. Oct. 30, 1972 ;-- Am. 1987, Act 28, Imd. Eff. May 14, 1987 ;-- Am. 1993, Act 198, Eff. Dec. 28, 1994

Compiler's Notes: Section 3 of Act 198 of 1993 provides as follows:"Section 3. (1)Except as provided in subsection (2), this amendatory act shall not take effect unless the state administrative board certifies in writing to the secretary of state by December 31, 1994 that an agreement for the transfer of all or substantially all of the assets and the assumption of all or substantially all of the liabilities of the state accident fund has been consummated with a permitted transferee pursuant to the requirements of section 701a of the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being section 418.701a of the Michigan Compiled Laws, as added by this amendatory act."(2) Sections 700 and 701a as added by this amendatory act shall take effect upon the date of enactment of this amendatory act."

Popular Name: Act 317

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WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)
Act 317 of 1969

418.301 Compensation for personal injury or death resulting from personal injury arising out of and in the course of employment; time or date of injury; compensation for mental disabilities and conditions of aging process; presumption; injury incurred in pursuit of social or recreational activity; "disability" defined; determining entitlement to weekly wage loss benefits; notice to Michigan employment security commission; priorities in finding employment; notice of employee refusing offer of employment; termination of benefits; "reasonable employment" defined; payment of benefits to persons incarcerated in penal institution or confined in mental institution; discrimination prohibited; personal injuries and work related diseases to which section applicable.

Sec. 301.

(1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

(2) Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.

History: Add. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1986, Act 313, Imd. Eff. Dec. 23, 1986 ;-- Am. 1987, Act 28, Imd. Eff. May 14, 1987

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.Former § 418.301, which pertained to compensation for personal injury or death resulting from personal injury, was repealed by Act 103 of 1985, Imd. Eff. July 30, 1985.

Popular Name: Act 317

Popular Name: Heart and Lung Act

1.

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WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT) Act 317 of 1969

418.321 Compensation for death resulting from personal injury.

If death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a worker's compensation magistrate may order the employer to continue to pay the weekly compensation or some portion thereof until the wholly or partially dependent person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to the partial dependents bears to the annual earnings of the deceased at the time of injury.

History: 1969, Act 317, Eff. Dec. 31, 1969 ;-- Am. 1980, Act 357, Eff. Jan. 1, 1982 ;-- Am. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1994, Act 271, Imd. Eff. July 11, 1994

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.

Popular Name: Act 317 **Popular Name:** Heart and Lung Act

WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)
Act 317 of 1969

418.331 Persons conclusively presumed to be wholly dependent for support upon deceased employee.

Sec. 331.

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, a worker's compensation magistrate shall find the wife was living apart for justifiable cause or because he had deserted her.

(b) A child under the age of 16 years, or over 16 years of age if physically or mentally incapacitated from earning upon the parent with whom he or she is living at the time of the death of that parent. In the event of the death of an employee who has at the time of death a living child by a former spouse or a child who has been deserted by such deceased employee under the age of 16 years, or over if physically or mentally incapacitated from earning, such child shall be conclusively presumed to be wholly dependent for support upon the deceased employee, even though not living with the deceased employee at the time of death and in all cases the death benefit shall be divided between or among the surviving spouse and all the children of the deceased employee, and all other persons, if any, who are wholly dependent upon the deceased employee, in equal shares the surviving spouse taking the same share as a child. In all cases mentioned in this section the total sum due a surviving spouse and his or her own children shall be paid directly to the surviving spouse for his or her own use, and for the use and benefit of his or her

own children. If during the time compensation payments shall continue, a worker's compensation magistrate shall find that the surviving spouse is not properly caring for such children, the worker's compensation magistrate shall order the shares of such children to be thereafter paid to their guardian or legal representative for their use and benefit, instead of to their father or mother. In all cases the sums due to the children by the former spouse of the deceased employee shall be paid to their guardians or legal representatives for the use and benefit of such children. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury. Where a deceased employee leaves a person wholly dependent upon him or her for support, such person shall be entitled to the whole death benefit and persons partially dependent, if any, shall receive no part thereof, while the person wholly dependent is living. All persons wholly dependent upon a deceased employee, whether by conclusive presumption or as a matter of fact, shall be entitled to share equally in the death benefit in accordance with the provisions of this section. If there is no one wholly dependent or if the death of all persons wholly dependent shall occur before all compensation is paid, and there is but 1 person partially dependent, such person shall be entitled to compensation according to the extent of his or her dependency; and if there is more than 1 person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. A person shall not be considered a dependent unless he or she is a member of the family of the deceased employee, or unless such person bears to the deceased employee the relation of widower or widow, lineal descendant, ancestor, or brother or sister.

History: 1969, Act 317, Eff. Dec. 31, 1969 ;-- Am. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1994, Act 271, Imd. Eff. July 11, 1994

Constitutionality: The Michigan supreme court held violative of the fourteenth amendment the conclusive presumption of dependency for widows set forth in the worker's disability compensation act. Day v. W A Foote Memorial Hospital, 412 Mich. 698, 316 N.W.2d 712 (1982).

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.

Popular Name: Act 317

Popular Name: Heart and Lung Act

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WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)

Act 317 of 1969

418.345 Death resulting from injury; expense of last sickness, funeral, and burial; payment by employer; limitation; application; order.

Sec. 345.

If death results from the injury, the employer shall pay, or cause to be paid, the reasonable expense of the employee's last sickness, funeral, and burial. The cost of the funeral and burial shall not exceed $6,000.00 or the actual cost, whichever is less. Any person who performed such service or incurred such liability may file an application with the bureau. A worker's compensation magistrate may order the employer to pay such sums.

History: 1969, Act 317, Eff. Dec. 31, 1969 ;-- Am. 1971, Act 187, Imd. Eff. Dec. 20, 1971 ;-- Am. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1994, Act 271, Imd. Eff. July 11, 1994 ;-- Am. 1996, Act 107, Imd. Eff. Mar. 5, 1996

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.

Popular Name: Act 317

Popular Name: Heart and Lung Act

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WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)
Act 317 of 1969

418.375 Death of injured employee; death benefits in lieu of further disability indemnity.

Sec. 375.

(1) The death of the injured employee before the expiration of the period within which he or she would receive weekly payments shall be considered to end the disability and all liability for the remainder of such payments which he or she would have received in case he or she had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity.

(2) If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death. Such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.

(3) If an application for benefits has been filed but has not

been decided by a worker's compensation magistrate, or on appeal and the claimant dies from a cause unrelated to his or her injury, the proceedings shall not abate but may be continued in the name of his or her personal representative. In such case, the benefits payable up to time of death shall be paid to the same beneficiaries and in the same amounts as would have been payable if the employee had suffered a compensable injury resulting in death.

History: 1969, Act 317, Eff. Dec. 31, 1969 ;-- Am. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1994, Act 271, Imd. Eff. July 11, 1994

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.

Popular Name: Act 317

Popular Name: Heart and Lung Act

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WORKER'S DISABILITY COMPENSATION ACT OF 1969 (EXCERPT)
Act 317 of 1969

418.401 Definitions; determination of entitlement to weekly wage lost benefits; notice to Michigan employment security commission; priorities in finding employment; notice of employee refusing offer of employment; termination of benefits; "reasonable employment" defined; personal injuries or work related diseases to which section applicable.

Sec. 401.

(1) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

(2) As used in this act:

(a) "Disablement" means the event of becoming so disabled.

(b) "Personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded

perceptions thereof. A hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and be promptly reported to the employer.

History: Add. 1985, Act 103, Imd. Eff. July 30, 1985 ;-- Am. 1986, Act 314, Imd. Eff. Dec. 23, 1986 ;-- Am. 1987, Act 28, Imd. Eff. May 14, 1987

Compiler's Notes: For legislative intent as to severability, see Compiler's note to § 418.213.Former § 418.401, which pertained to definitions, was repealed by Act 103 of 1985, Imd. Eff. July 30, 1985.

Popular Name: Act 317

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PUBLIC ACTS OF THE LEGISLATURE OF THE STATE OF MICHIGAN PASSED AT REGULAR SESSION OF 1919

ACT 64

PART II

SEC.6 The following persons shall be conclusively presumed to be wholly dependant for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the industrial Accident Board shall find the wife was living apart for justifiable cause or because he had deserted her;

(B) A husband upon a wife with whom he lives at the time of her death.

The ST. PAUL
Property and Liability insurance
Suite 300, MC MICH
1301 W Long Lake Road Troy, MI 48098

May 27, 2003

Daniel Willman
PO Box 118
South Lyon, MI 48178

RE:

TRACKING NUMBER:	MA00697
CLAIMANT:	MERVIN WILLMAN
INSURED:	MUELLER PIPELINERS INC
Claim No.:	WVA630282112A001
Your File Number:	
Date of Loss:	December 5, 1995

Dear Mr. Willman,

I am writing in response to your letters. Upon receipt of the initial letter I sent a medical authorization form to Mervin Willman based upon the HIPPA law and the fact that I do not have anything in the file to indicate that you are representing him as counsel as opposed to a family member. To date I have not received the signed release.

In speaking with defense counsel your request for the peer review's and the doctors Curriculum Vitae is an unreasonable request and therefore I will not be forwarding the reports.

It was my understanding based upon our last conversation that you were going to look into having prescriptions direct billed. I received a letter from your mother dated May 15th in which she makes reference to several bills that we have not received. By way of this letter I am also requesting the scripts for the paraffin wax machine and the equipment from Binson's so that I may request that the doctors address whether these are reasonable and necessary.

In the future I would suggest that you make a decision as to who is going to communicate with this office. Receiving letters from both you and your mother makes things more complicated and I think one line of communication would be a better way to go. However, I will request that any future communications take place in written form,

Sincerely

s/s Kim Kaines
ST. PAUL PROPERTY AND CASUALTY INSURANCE COMPANY
Kim Kaines
Claim Rep-Work Comp
Telephone: (248) 952-6648
Fax: (248) 952-6624
KIM.KAINES@STPAUL,COM

CONCENTRA

Locally focused and Nationally recognized

Patient name: Mervin Willman
Social Security: 000-00-0000

Review type: Chart review

Completion date: 9/16/02

Contact: The chart was reviewed and consisted of the physician advisor referral form requesting a review of the list of attached prescriptions for relationship to the injury, which is quadriplegia, and also a letter from Mary Ann Willman dated 7/22/02 to Craig Livingstone, and a letter from Marilyn Grossman, RN, Medical Case Manager, dated 8/13/02, , medical information from ASU Group dated 8/13/02, a letter from Aegis Health Perspective dated 8/5/02, and multiple pages pf a list of prescription medications that the patient has received.

Referral reason: To review the medication list and determine a relationship between prescriptions that have been prescribed and quadriplegia.

Disclaimer: 1 and N not explained since this was a chart review only.

Appeals process: Not explained

Clinical summary: The patient, Mervin Willman, is 62 years old and was injured on 12/5/95. He was involved in a motor

vehicle accident, suffered a C4-5 quadriplegia. He has multiple other diagnoses including coronary artery disease. He is post coronary artery grafting in January 2002, he has a history of ischemic cardiomyopathy, hypothyroidism, obstructive sleep apnea, arteritis, atrial fibrillation with rapid ventricular rate and ventricular ectopy, COPD, history of congestive heart failure, also C6-7 quadriplegia with labile blood pressure and frequent urinary tract infections. There appear to be discrepancies between documented level of quadriplegia at C4-5 or C6-7.

The medical records reviewed consist of eight pages of prescriptions that have been written for Mr. Willman plus a Willman Medication Summary dated July 2002. Some of the quadriplegia results in multiple complex medical conditions, The inactivity and pathophysiological changes that occur secondary to the quadriplegia may result in pulmonary dysfunction and hypoxemia. It can result in urinary tract infections and renal failure. The physical, emotional and lifestyle changes that occur as a result of the quadriplegia can cause depression. According to Yarkony in the article, *Body Composition and Spinal Cord-Injured Adults.* In Sports Medicine 1997, 23 (1) pages 48-60, January edition, the mortality rate for cardiovascular disease is 28% higher in the spinal cord injured population. According to Groah and Mentor in 1998, coronary heart disease is becoming a leading

Patient name: Mervin Willman
Social Security: 000-00-000

source of morbidity and mortality in spinal cord-injured patients with increasing survival. Phillips and Karatli, in *Current Problems in Cardiology 1998,* recommend an aggressive cardiac prevention program because of the increased cardiovascular risk. According to Groah 2001, in a study published in Spinal Cord. June 2001 edition, rates of cardiovascular disease were increased with increasing age in all neurological groups and more complete spinal cord injury was associated with an excess of 44% all cardiovascular disease risk.

There is a clinical trial sponsored by the Department of Veterans Affairs that is currently investigating the prevalence of incidents of different types of cardiac disease and ECG abnormalities in spinal cord-injured patients.

In reviewing the medications prescribed for Mr. Willman:

Accupril is used to control hypertension. Many patients have hypertension that do not have quadriplegia by the time they are 62. It is not clear that the Accupril is directly related to the quadriplegia, although there is increasing evidence of increased risk of coronary artery disease in patients with spinal cord injury and it is important to treat the hypertension to help prevent the heart disease.

CONCENTRA

Patient name: Mervin Willman
Social Security: 000-00-000

The Amiodarone is an antiarrhythmic medication and it is not clear how the atrial fibrillation is specifically related to the spinal cord injury, although it is medically appropriate to treat arrhythmia.

Aspirin is used for prevention of myocardial event. He has taken Lovenox for treatment or prevention of DVTs.

Baclofen is an antispasmodic. Patients with quadriplegia may have multiple muscle spasms and pain as a result of the neurological injury.

Celebrex is prescribed for pain and arthritis. The patient has a history of a shoulder injury, as well, and the clelbrex is most likely used for pain relief.

Colace is prescribed for GI problems resulting from the decreased GI peristalsis secondary to the quadriplegia and appears to be medically necessary for this patient with quadriplegia.

Coumadin is used to prevent blood clots or to treat a thrombophlebitis. There is insufficient information to determine specifically why the patient is receiving the coumadin, but because of the patient's inactivity, he would be susceptible to thrombotic emboli and pulmonary emboli, and **CONCENTRA**

the Coumadin would be medically appropriate for that.

Cranberry is prescribed for urinary tract infections and appears to be medically necessary since this patient has a history of urinary tract infections, and that is also not uncommon in quadriplegic patients because of neurogenic bladder.

Darvocet is used for pain and pain may result from muscle spasms or could result from the shoulder injury.

Ducolax and FiberCon are used for treatment of the neurogenic bowel and decreased gastrointestinal peristalsis resulting in constipation.

Feosol is iron and is used in someone has poor iron intake or blood loss. There is insufficient information documenting that this employee has had blood loss. However, with quadriplegia, it is important that his nutritional status be maintained, and if he is anemic secondary to iron deficiency, it would be medically appropriate to be given Feosol, but there is insufficient information from this medical record to support that.

Folic acid is also a nutritional supplement. It is not clear from

the medical records that the folic acid is required for this individual. However, it is important to maintain proper nutritional status and it would be difficult for someone with quadriplegia to maintain adequate nutritional status.

Gingko biloba does not appear to be medically necessary.

LactAid does not appear to be medically necessary. It is usually used for lactose intolerance. It is not clear how that relates to the spinal injury.

Lasix is used for congestive heart failure, which is related to hypoventilation, according to the medical records provided, so it would appear to be medically appropriate and would also help with congestive heart failure.

Lipitor is used to control cholesterol. Patients with cardiovascular disease are more prone to elevated cholesterol levels because of their inactive lifestyles and if medically indicated by lipid studies, the Lipitor may be medically appropriate to control the cardiovascular disease.

MS Contin is used for severe pain secondary to muscle spasm or neurological pain or shoulder injury.

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Locally focused and Nationally recognized

Social Security: 000-00-000

Neurotin is used for neurological pain and is medically appropriate.

Paxil is used as an antidepressant and often patients with spinal cord injury have some degree of depression and the Paxil would appear to be medically necessary.

Prevacid is used for reflux, although it is not clearly stated that the employee has reflux. It is possible that the Prevacid is used for gastrointestinal upsets and reflux, and it would be medically appropriate if the employee has evidence for this on clinical examination and history. Phazyme, Reglan and Senokot are all used to decrease the gastrointestinal discomfort secondary to motility problems and constipation. The employee has taken metoclopramide to help GI motility also.

Synthroid is treatment for hypothyroidism, which is not related to the injury.

Thiamine, vitamin E and vitamin C are not clearly related to the spinal cord injury but are rather to maintain the employee's nutritional status.

Valium may be used for muscle spasms and is medically appropriate and related to this injury.
CONCENTRA

It is not clear how vinpocetine is medically related. Additional information would be required to determine the medical relatedness of the vinpocetine to this injury.

Unisys and levaquin are antibiotics and is medically appropriate for this employee for treatment of decubitus, wound, urinary or pulmonary infections.

Alubuterol and iratropium are used for breathing and pulmonary problems for treatment of the hypoventilation to the spinal cord injury.

BiPap is used for treatment of sleep apnea. It is not clear how the sleep apnea relates to the employee's quadriplegia, although it is documented that he has increased weight gain that could also further aggravate a hypoventilation secondary to cervical quadriplegia.

The patient was on Paxil for depression and ambien for sleep. The melatonin and sam-e do not appear to be medically necessary because of a lack of peer reviewed literature.

Flomax was prescribed for the urine voiding difficulty secondary to the quadriplegia and is medically necessary. It is also used for medical treatment of enlarged prostate but

there is no indication in the records provided that this employee has an enlarged prostate.

Mr. Willman is also taking potassium, glucosamine and chondrotin. It is not clear how the glucosamine and chondrotin relate to the spinal injury or shoulder injury.

Also, it is unclear how the Cafergot relates to quadriplegia.

Fosamax is a bone resorption inhibitor and it is not clear, specifically, how that is directly related, although the inactivity could lead to increased bone resorption, so it is probably medically appropriate and related to the spinal injury.

He has also been given Proamatine, which is a vasoconstrictor, to improve the blood pressure. Sometimes spinal cord patients become hypotensive and have difficulty maintaining a stable blood pressure. Therefore, this appears to be medically necessary.

Recommendations: The majority of medications listed appear to be medically appropriate for treatment of cardiovascular disease, urinary, pulmonary and gastrointestinal complications resulting from the quadriplegia.

CONCENTRA

Locally focused and Nationally recognized

Patient name: Mervin Willman
Social Security: 000-00-000

The nutritional supplements such as vitamin C and E do not

appear to be directly related. The potassium does appear to be medically necessary and related to the use of Lasix and is recommended as medically necessary. Vitamin E, vitamin A, gingko tablets and also Synthroid do not appear to be directly related to treatment of the cervical spinal cord injury and quadriplegia. The melatonin and sam-e are not recommended as medically necessary because of a lack of peer reviewed literature proving effectiveness.

Rationale/criteria: Based on review of the peer-reviewed medical literature as listed above, the articles by Groah and Yarkony, clinical judgment and generally accepted standards of medical practice.

Physician advisor: Melissa Bean, DO, FACOEM
Board certified: Occupational Medicine and Family Practice